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July 11, 2008

The Honorable Carlos M. Gutierrez
Secretary of Commerce
Herbert C. Hoover Building
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Re: New York State's Response to Broadwater's Motion to Supplement the Decision Record

Dear Secretary Gutierrez:

In response to the motion of Broadwater Energy LLC and Broadwater Pipeline LLC ("Broadwater") dated July 7, 2008 to supplement the decision record, New York State Department of State ("NYSDOS") requests that the US Secretary of Commerce not accept for entry into the decision record Broadwater's submission of Supplemental Documents I, II, and III. These biased or otherwise unsubstantiated reports were neither requested by the Secretary nor serve as clarifying information. Rather, Broadwater's submissions were recently prepared to directly respond to two alternatives raised in the NYSDOS decision, despite having had specific information on the NYSDOS alternatives as early as April 2007 and having jointly shared technical information related to Atlantic Ocean alternatives since that time.

In its consistency determination of April 10, 2008, NYSDOS identified two alternative locations, outside of Long Island Sound, in the Atlantic Ocean where a floating storage regasification unit (FSRU) and connecting pipeline could be located. These were identified with the assistance of its world renowned energy consultant, Battelle Memorial Institute. NYSDOS identified interconnections to both the Transco-Long Beach Pipeline and the Iroquois Pipeline at South Commack Long Island. Either of these alternatives, if implemented as described, would not require further consistency review from the NYSDOS.

On this appeal, Broadwater seeks to introduce four (4) documents, three of which purport to be new studies:

- (1) **Supplemental Document I** - a Alternative Site Operability Study prepared by Moffatt & Nichol
- (2) **Supplemental Document II** - a "Witness Model" prepared by Shell, a joint venturer in Broadwater, explaining the meaning of Supplemental Document I.
- (3) **Supplemental Document III** - Alternate Pipeline Routes Cost Estimate, prepared by Broadwater Energy

(4) **Supplemental Document IV** - a Coastal Fish & Wildlife Habitat Rating Form for Great South Bay – West, prepared by NYSDOS on March 15, 1987. NYSDOS does not object to its inclusion in the decision record.

Under the Coastal Zone Management Act, the initial record used by the Secretary for the appeal is the consolidated record maintained by the lead Federal permitting agency; in this case, FERC is the lead permitting agency. 16 U.S.C. § 1466. The consistency regulations give the Secretary broad authority to determine the content of the appeal decision record. 15 C.F.R. 930.127(e)(1). For energy project appeals, however, supplemental information may be admitted to the decision record only if the Secretary specifically requests, on an expedited basis, supplemental information to complete a consistency review or clarifying information submitted by a party to the proceeding related to information in the consolidated record compiled by the lead Federal permitting agency. 15 C.F.R. 930.127(i)(4) and 930.130(a)(2)(ii)(A)-(B). NOAA intended the Energy Policy Act of 2005 and 15 C.F.R. 930.127(i) to streamline the consistency appeals process by making it less time consuming. 71 Fed. Reg. 800. With this goal of efficiency in mind, NOAA recognized that “the Energy Policy Act is a limitation on the Secretary’s evidentiary record.” 71 Fed. Reg. 800.

Instead of promoting efficiency, Broadwater inappropriately seeks to create an opportunity to submit 185 single-spaced pages of new, previously unavailable and self-serving “clarifying information” for inclusion in the decision record. These materials contain arguments and opinion which, in effect, supplement its principal brief and do not serve to clarify the decision record on appeal.

A. Broadwater’s Motion to Supplement Undermines the General Counsel’s June 20, 2008 Order

On June 20, 2008, NOAA General Counsel Jane C. Luxton issued an Order in response to several procedural motions by both parties. In response to Broadwater’s request to extend its principal brief to 100 double-spaced pages, Ms. Luxton ruled that Broadwater has not shown good cause justifying such a page extension and limited Broadwater’s principal brief to 50 double-spaced pages to accommodate Broadwater’s “**potential** need” to address the two alternatives proposed by NYSDOS. In blatant disregard of her Order, Broadwater attempts to circumvent the page limit by “supplementing” the record with 185 pages of so-called “clarifying information”.

Clarifying information is intended to shed light on information in the Consolidated Record; it is not meant to introduce entirely new studies and information, which require independent verification. For example, in the Weaver’s Cove appeal, the General Counsel’s April 22, 2008 Order allowed into the decision record letters and comments from federal agencies and six other letters, all of which either predated the consistency determination or actually clarified information already in the record. The Secretary held that the “inclusion of the documents is appropriate because they clarify information already contained in the consolidated record of this appeal.” (Appendix A, page 2). In her Letter Order of June 24, 2008, General Counsel Luxton did not include in the Weaver’s Cove decision record an Offshore Berth Proposal Letter. Its relevance to clarifying matters in the consolidated record has been called into question.

In this matter, Broadwater’s studies either introduce entirely new data or are argumentative in nature. They are not clarifying information. For example, the “Witness Model” (Supplemental Document II), whose authorship is unknown, purports to interpret the metocean data and operational information in Supplemental Document I and explain to NOAA the reasons why Broadwater disfavors the Atlantic Ocean alternatives and prefers the proposed location in Long Island Sound. It begins:

“The purpose of this study is to understand the impact on the reliability of the base sendout that would occur if the planned Broadwater Floating Storage and Regasification Unit (FSRU) was

moved from the benign waters of Long Island Sound to the Atlantic alternative locations proposed by the New York Department of State (NYDOS).”

(SD page 95). However, it is a “study” in name only. The majority of its contents reads like a continuation of the discussion in Broadwater’s principal brief of Element III (“alternatives”) (pages 34-50). The Witness Model argues against the viability or feasibility of the Atlantic Ocean alternatives. The use of data does not negate its underlying purpose which is to expand on the arguments of its principal brief in violation of General Counsel Luxton’s Order.

The Supplemental Documents I, II, and III are simply a backdoor attempt to circumvent the 50 double-space page limit and provide over 160 additional pages of information to extend its element 3 analysis under 15 C.F.R. 930.121(b). It is requested that the Secretary recognize Broadwater’s efforts to circumvent Ms. Luxton’s June 20, 2008 Order and reject the Supplemental Documents I, II, and III as a violation of the 50 double-spaced page limit.

B. Broadwater’s Motion Contains Factually Inaccurate Statements to Justify Supplementation

Broadwater seeks to justify its inclusion of three new studies (Supplemental Documents I, II and III) by representing that it has never seen the two alternatives prior to NYSDOS’s April 10, 2008 consistency objection.¹ As will be shown, nothing could be further from the truth. For Broadwater to claim it was unaware of these alternative sites defies credulity.

Broadwater has exhaustively analyzed these specific alternatives. Both the draft environmental impact statement² and the final environmental impact statement³ for the Broadwater project contain analyses of the two Atlantic Ocean alternatives identified in the DOS Objection letter. Broadwater has taken many opportunities to review and comment on the Atlantic Ocean alternatives in the environmental impact statements.

¹ Paragraph 6 of Broadwater’s motion states:

“To assist the Secretary in a full and accurate examination of the availability of NYSDOS’s proposed Atlantic Ocean Alternatives, Broadwater commissioned the simulation, operability studies and cost estimate that it now moves to include in the decision record. These documents (and NYSDOS’s Coastal Fish & Wildlife Habitat Rating Form for Great South Bay – West) address the specific alternative FSRU locations **that were identified in the Objection for the first time. To the best of Broadwater’s knowledge**, although NYSDOS was a cooperating agency under the National Environmental Policy Act in the creation of FERC’s Final Environmental Impact Statement (“FEIS”) for the Broadwater Project, **NYSDOS did not submit FSRU alternatives to FERC during that process at the specific locations of Alternative 1 or Alternative 2. Nor did NYSDOS ever submit Alternative 1 and Alternative 2 to Broadwater prior to including them in the Objection (and even then, with a lack of specificity). While the general concept of an FSRU in the Atlantic Ocean was mentioned in a 2007 metocean analysis commissioned by NYSDOS, the specific locations of Alternatives 1 or 2 were not provided to Broadwater....**” (Emphasis added)

² Consolidated Record Document #434, BW009185-BW0010012. See discussion of alternative sites at BW009547-BW009593.

³ Consolidated Record Document #1911, BW028733-BW030952. See discussion of alternative sites at BW029174-BW029230.

Beginning in April 2007, a series of nine (9) technical meetings between Broadwater and NYSDOS took place to discuss the alternative sites in the Atlantic Ocean for mooring the FSRU.⁴ The State and Broadwater agreed to fully share technical data related to the Atlantic Ocean alternatives. NYSDOS provided Broadwater with a study of ocean conditions, prepared by its consultant Battelle Memorial Institute⁵, demonstrating the feasibility of these two alternative locations. In response to the Battelle analysis, Broadwater prepared several presentations and charts discussing the two alternatives⁶. These were submitted to FERC under an eight (8) page cover letter dated August 15, 2007 to Kimberly D. Bose, Secretary, FERC, in which Broadwater reported on the joint meetings concerning Atlantic Ocean alternatives.⁷ In that letter, Broadwater specifically discussed the meta ocean conditions associated with alternative locations in the Atlantic Ocean. All of this took place in 2007, well before NYSDOS's decision objecting to the proposed Broadwater project in Long Island Sound. Ultimately, NYSDOS became convinced that Battelle's analysis of the viability and feasibility of these alternative sites was the scientifically correct result.

Curiously, Broadwater even cites to Battelle's report entitled, "Task 6: Review of Ocean Conditions Data and their Impact on Project Feasibility"⁸, as a reference in Supplemental Document I.⁹ This contradicts Broadwater's claim that they became aware of the Atlantic Ocean for "the first time" with NYSDOS's April 2008 consistency objection. The Battelle Task 6 report analyzes, with specificity, the ocean conditions of the alternative Atlantic sites and concludes that the alternatives are feasible locations for Broadwater's project.

On September 17, 2007, some seven months before NYSDOS's decision, Broadwater filed a packet of studies with FERC discussing the reliability of the Atlantic Ocean based alternative as compared with the Long Island Sound location from the standpoint of operational restrictions relating to metocean conditions.¹⁰ The September 17, 2007 Broadwater filing also relates reliability to market price behavior. These studies can be found in the Consolidated Record, presently before the Secretary, at Document #1664 (BW024066-BW024157). Additional Broadwater analyses of the Atlantic Ocean alternatives can be found in other documents in the Consolidated Record.¹¹ All of this information was filed well before NYSDOS's consistency decision in April 2008.

⁴ Technical meetings were held on April 12, 2007, May 2, 2007, May 23, 2007, June 13, 2007, July 24, 2007 and August 23, 2007. In addition, the parties met on November 11, 2007, March 19, 2008 and March 25, 2008 where Atlantic Ocean alternatives were discussed.

⁵ Battelle Memorial Institute is a world leader in marine science, deep sea research, pipeline safety and infrastructure integrity, and national security. Battelle has been retained by energy providers and by such federal government agencies as the Environmental Protection Agency, the Navy, the Marine Corps and the U.S. Department of Homeland Security. See <http://battelle.org>

⁶ See Consolidated Record Document # 1592 beginning at p. 45; BW019144.

⁷ Id. at p.1.

⁸ Battelle, Review of Ocean Conditions Data and Their Impact on Project Feasibility, NYSERDA Contract 9562, Task 6 (May 2007). BW041954-BW041985

⁹ Supplemental Documental I, Alternative Site Operability Study, page SD56.

¹⁰ Consolidated Record Document #1664, BW024066-BW024157

¹¹ Consolidated Record Document #1317, BW017058-BW017110 (starting at BW017079 Broadwater evaluates Atlantic off-shore sites)

All of Broadwater's materials are contained in the consolidated record before FERC and consequently are part of the decision record before the Secretary. To the extent that Broadwater has represented that the two alternative are "new", the decision record refutes that claim. Broadwater has exhaustively addressed these issues in the decision record and should not be permitted to introduce new studies, which were neither requested by the Secretary nor constitute clarifying information, at this late date.

C. Broadwater Ignored the NOAA Regulatory Directive to Consult With the State Agency on the Contents of the Decision Record

Broadwater premises its motion on the Secretary's authority to accept supplemental information into the decision record that clarifies information contained in the consolidated record. 15 C.F.R. § 930.130(a)(2)(ii)(B). Additionally, Broadwater acknowledges that "[t]he Secretary enjoys wide latitude and "broad authority" to determine the content of the decision record so as "to ensure efficiency and fairness to all parties." 15 C.F.R. § 930.127(e)(1).

Opposing the interests of fairness, Broadwater ignored the directive in 15 C.F.R. 930.127(c)(3) for the parties "to discuss the contents of the appellant's appendix in order to include in the appendix as much of the supporting documentation and materials as any party deems necessary for consideration by the Secretary". In a telephone conversation initiated by NYSDOS, on July 3, 2008 Thursday at 4:15 pm, one day before a federal holiday, Broadwater's attorneys advised NYSDOS attorneys that Broadwater planned to file its principal brief and a motion to introduce these studies the next business day, Monday July 7, 2008. There was no discussion with NYSDOS about the production these studies.

More brazenly, Broadwater actually references the Supplemental Documents in its principal brief even though these documents have not yet been admitted to the decision record. See Broadwater Initial Brief at 44, 45, 45, 48; 15 C.F.R. 930.130(a)(2)(ii). Broadwater oversteps its bounds by assuming that the Secretary will admit the Supplemental Documents; however, it is the Secretary's role to "determine the content of the appeal decision record." 15 C.F.R. 930.127(e)(1); 15 C.F.R. 930.130(a)(2). It is respectfully requested that Broadwater's reference to the Supplemental Documents in its brief be, at a minimum, redacted as its inclusion weakens the Secretary's decision-making authority delegated pursuant to the regulations.

D. NYSDOS's Responses to Specific Supplemental Documentation

Supplemental Document I:

Broadwater's consultant, Moffatt & Nichol, produced an analysis of 20 year Wave Information Studies (WIS) dataset instead of the 10 year dataset used by NYSDOS's contractor, Battelle Memorial Institute.¹² In addition, Broadwater used ocean condition data from a different offshore buoy which

Consolidated Record Document #1502, BW018199-BW018227, Additional Alternatives Analysis of Broadwater Energy (including maps of Atlantic Ocean sites)

Consolidated Record Document #1592, BW019086-BW019331. The Appendix contains the Power Point slides from the meetings with the DOS

¹² Consolidated Record Document #2092 (BW041954-BW041985) Battelle Memorial Institute, Review of Ocean Conditions Data and Their Impact on Project Feasibility, NYSEDA Contract 9562, Task 6 (May 2007) at page 1.

exaggerates ocean conditions, as the buoy is located further out from shore than the actual Alternative 2 location. This disparity in wave data makes it difficult to compare data tables and calculations for accuracy and relevancy. This new study will require further analysis by Battelle, NYSDOS's consultant.

Broadwater also includes an operability study which uses the same model as in a 2005 Moffatt & Nichol reports, but do not indicate what is different or updated. There is no explanation of the model parameters used in generating graphical and tabular model outcomes, no statement of assumptions, no formulas, and therefore, no way for NYSDOS or the Secretary to verify accuracy or appropriateness of modeling runs. Further analysis will also be required in response to the operability study.

Supplemental Document II:

Witness Modeling (Supplemental Document II) is a report which appears to have come from a fill-in-the-blank business simulation software product. It purports to interpret the wave data in Supplemental Document I in a manner that attempts to support Broadwater's position. The Witness Modeling study is merely an extension of Broadwater's brief, not a scientific study, and no credentials are provided for the author of the report. From the heading of the report it appears that a party to the joint venture in Broadwater - Shell - produced the simulation. There is no scientific justification for either the data used or the assumptions that form the basis of the simulation. This type of biased report does not belong in the decision record and it is requested that the Secretary reject Broadwater's attempt to supplement the record with it.

Supplemental Document III:

Supplemental Document III is an Alternative Pipeline Routes Cost Estimate prepared by Broadwater. While cost of a chosen alternative is a factor which may be argued in the principal briefs, a self-generated cost study does not clarify the existing information in the decision record. It should not be admitted to the decision record because increased cost alone does not render an alternative unreasonable.

Even where an alternative is "'expensive' and 'uncertain'" as well as "'time consuming,'" case precedent establishes that the alternative is still reasonable and available. Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of Millennium Pipeline Company, L.P. From an Objection by the State of New York, Dec. 12, 2003 at 29 (Millennium Decision), citing Decision and Findings in the Consistency Appeal of Chevron U.S.A. Inc., Oct. 29, 1990 at 59. Rather than the test for reasonableness relying solely on cost, "[w]hether an alternative will be considered 'reasonable' depends upon its feasibility and upon balancing the estimated increased costs of the alternative against its advantages." Decision and Findings in the Consistency Appeal of Southern Pacific Transportation Company to an Objection from the California Coastal Commission, Sep. 24, 1985 at 18. The Secretary should reject Broadwater's attempt to include Supplemental Document III as clarifying information.

E. If the Secretary grants Broadwater's Motion to Supplement, NYSDOS seeks an extension time to prepare and submit an analysis of Broadwater's studies and address the information in its Principal Brief

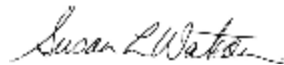
In NOAA's February 22, 2008 letter order dealing with supplemental information in the Weavers Cove appeal, the closing of the record was extended by 60 days to give the parties additional time to address the inclusion of supplemental information to the decision record. The Secretary also established a deadline for parties to submit supplemental briefs advancing all arguments on "documents and information admitted to date", as well as a March 21, 2008 additional deadline for the parties to submit briefs to advance arguments regarding the March 14, 2008 submissions.

Here, Broadwater seeks to introduce three self-generated studies about which NYSDOS was not informed and that extend the arguments of its principal brief regarding opposing the Atlantic Ocean alternatives. None of its submissions constitute clarifying information and all should be rejected.

If Broadwater's studies are introduced into the decision record, NYSDOS requests that it be given additional time to address those documents in its principal brief or be given the opportunity to submit a supplemental brief after service of its principal brief and Broadwater's reply brief.

WHEREFORE, Broadwater's motion to include Supplemental Documents I, II, and III in the decision record should be denied. In the event the Secretary grants the motion to enter any of the supplemental documents (except Supplemental Document IV) into the decision record, NYSDOS requests an extension of 45 days beyond its August 7, 2008 principal brief submission deadline, to prepare a counter study and, additionally, that NYSDOS be provided with the opportunity to submit a 25 page double-spaced supplemental brief by which arguments may be advanced as to the veracity and relevancy of the supplemental documents.

Respectfully Submitted,



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SLW/dw

Attachment

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